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IN THE
Supreme Court of the United States
October Term, 1984

DONALD J. DEVINE, Director, Office of Personnel Management,

Petitioner,

v.

NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, INDEPENDENT SECTOR, THE NATIONAL BLACK UNITED FUND, THE AMERICAN JEWISH CONGRESS, AND THE PUBLIC CITIZEN FOUNDATION

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INTERESTS OF *AMICI CURIAE*

This brief *amicus curiae* is submitted on behalf of the National Committee for Responsive Philanthropy, Independent Sector, the National Black United Fund, the American Jewish Congress, and Public Citizen Foundation, in support of the respondents NAACP Legal Defense and Education Fund, Inc., *et al.*

The *amici* are public charities as defined by the Internal Revenue Code, 26 U.S.C. § 509, and rely on public support to sustain their activities. Although diverse in their charitable aims, the organizations participating as *amici,* or their members, engage in substantial litigation, lobbying or public education as a means of advancing their charitable goals. Thus, they are all either directly or potentially threatened by the exclusion of advocacy groups imposed by the Executive Order. As a result, they are either currently ineligible to participate in the Combined Federal Campaign ("CPC") or their eligibility may well be jeopardized in the future.[1]

Amicus National Committee for Responsive Philanthropy ("NCRP") represents the interests of its members and other charitable organizations whose efforts are intended to promote social, economic and political justice. Its members include groups involved in a wide range of activities addressing health, social welfare, housing, neighborhood revitalization, civil rights, equal employment opportunities, environmental protection, and consumer issues. NCRP is funded primarily through foundation and corporate contributions, and has not sought to participate in the CFC. However, at least one-third of the NCRP's member organizations seek to raise

[1]Eligibility to participate in the CFC historically has been restricted to charities that serve public health and welfare functions. As the lower courts found, respondents and similar organizations, such as *amici,* plainly fall within the category of health and welfare charities. Because that limitation is not challenged by respondents, references in this brief to charitable organizations include only those organizations that promote public health and welfare, and would therefore not include other types of charities, such as art groups, colleges, sporting clubs, or fraternal organizations.

funds and promote their organizational objectives through the CFC.[2]

Amicus Independent Sector is a broad-based coalition of 595 member and affiliate organizations founded in 1980 to preserve and enhance this Nation's tradition of giving, volunteering, and not-for-profit initiatives. Independent Sector includes many of the major philanthropic and voluntary organizations in this country, and has frequently participated in litigation before this Court involving regulation of charitable organizations. *See State of Maryland v. Munson,* 104 S. Ct. 2839 (1984); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). Independent Sector is concerned, however, that acceptance of petitioner's position in this case would lead to the exclusion of some of its members from the CFC, solely because they engage in litigation, lobbying or public education activities to promote their charitable goals.[3]

Amicus National Black United Fund, Inc. is an organization comprised of affiliated groups throughout the

[2]NCRP member organizations currently participating in the CFC, but whose eligibility is threatened by the advocacy restrictions imposed by the Executive Order, include the Black United Fund of New Jersey, Aid to Wisconsin's Organizations, the Children's Foundation, the Detroit Black United Fund, the Food Research and Action Project, the Gray Panther Project Fund, NOW Legal Defense and Education Fund, the Native American Rights Fund, the Philadelphia Project on Occupational Safety and Health, the Women's Fund of Greater Washington, and the Vietnam Veterans of America Foundation.

[3]Independent Sector acts in this matter through its board of directors; its joining this brief does not imply that each of its member organizations has taken a position on the questions presented here.

country, which were organized to provide financial support to various programs benefiting the Black community. Among other projects, the National Black United Fund and its affiliates support programs concerning economic development, health and welfare, social justice, legal assistance, and alternative education. Each of the National Black United Fund's affiliates is, at present, participating in the CFC, and each desires to continue to participate. However, in light of their support of litigation and public education programs, the eligibility of the Fund's affiliates to continue to participate in the CFC would be jeopardized if the petitioner prevails in this litigation.

Amicus American Jewish Congress is a national organization that has worked for over sixty years to secure the civil rights and civil liberties of the American Jewish community and Jews throughout the world. It has engaged in litigation, lobbying and public education campaigns in its efforts to combat anti-Semitism, social injustice, mistreatment of Soviet Jewry, and government entanglement with religion. While the American Jewish Congress has not sought to participate in the CFC to date, it is concerned that the opportunity to participate in the future will be foreclosed if petitioner's position is upheld.

Amicus Public Citizen Foundation is a Washington-based organization founded to support the educational activities of Public Citizen, which for over a decade has been involved in a wide range of activities on behalf of consumers, including research and public education on health and safety issues, lobbying for legislative reform, and litigation on a broad spectrum of health and safety issues. Under the district court's order in this case, Public Citizen Foundation has been permitted to participate in the CFC, and it desires to continue to do so. However, given Public

Citizen's advocacy activities, which the Foundation supports, the Foundation might be denied access to the CFC in the event petitioner prevails.

Despite their diversity, the charitable organizations that have joined together to file this brief share a common concern. In their view, the restrictions imposed by Executive Order 12,404, which exclude from the CFC charitable organizations that engage in litigation, lobbying or public education as a means of advancing their charitable goals, violate the First Amendment and cannot stand.

Amici are also concerned about two features of the petitioner's position which are not only critical to the resolution of this case, but which have far broader implications. First, *amici* urge the Court to reject the petitioner's contention that the CFC is a "non-public" forum, and thus decisions to exclude various charitable groups must be sustained whenever the petitioner can point to a "reasonable" justification for the exclusion. The CFC is at least a limited public forum. Indeed, it was established solely to provide a forum for communications between charitable organizations and government employees. Millions of federal employees depend on the CFC as their principal source of information about charities and their main vehicle for making charitable contributions. Therefore, given the role the CFC plays and its critical importance to both participating charities and federal employees, the CFC is a limited public forum. Accordingly, the petitioner's decision to exclude certain charitable organizations from the CFC must be subjected to careful scrutiny.

Second, the Court should reject the petitioner's rationale for excluding advocacy groups. The petitioner's attempt to draw a distinction between "traditional" charities and charities that engage in advocacy is outmoded and unten-

able. Although it is the cornerstone of the petitioner's case, he nowhere explains the grounds for his conclusion that there is a constitutionally sound basis for differentiating between an organization that, for example, provides food for the hungry, and one that engages in litigation or a public education campaign to expand the scope of the food stamp program. The charitable goal – ensuring that the hungry are fed – is precisely the same; only the means differ. Moreover, excluding organizations on the ground that advocacy may stir up controversy strikes at the core of the First Amendment, particularly where the litigation, lobbying and public education activities identified by the petitioner as provoking the controversy are fully protected by the Constitution.

STATEMENT

The history of the CFC, and of the evolution of the eligibility requirements at issue in this case, are set forth in the brief of respondents and will not be repeated here. Moreover, because respondents' brief will present a comprehensive rebuttal to the arguments advanced by the petitioner, *amici* join in the arguments made by respondents rather than attempting to restate all of respondents' arguments. *Amici* believe, however, that it is worthwhile to file this brief in order to focus the Court's attention on several issues which have critical importance, and which may not stand out in respondents' comprehensive point-by-point refutation of the petitioner's claims.

ARGUMENT

Introduction And Summary Of Argument

There can be no dispute that the solicitation of funds by charitable organizations is "within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980); *State of Maryland v. Munson,* 104 S. Ct. 2839 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Petitioner does not contest this settled doctrine. Rather, the linchpin of the petitioner's case is his contention that the CFC must be deemed to be an indistinguishable component of a non-public forum – the federal workplace – and thus his decision to exclude from the CFC all charitable organizations that engage in significant advocacy activities is immune from searching scrutiny by this Court. Indeed, according to the petitioner, his decision must be sustained so long as it can be viewed as a "reasonable" one. In so arguing, the petitioner appears to concede that his exclusion of advocacy groups could not pass muster if subjected to the heightened level of scrutiny applicable in public forum and limited public forum cases.

As we demonstrate below, neither component of the petitioner's argument is well-grounded. In the first place, the petitioner's analysis of the relevant forum is flawed; there is no support for the petitioner's contention that the federal workplace – rather than the CFC – is the forum at issue. The CFC is plainly a forum in its own right, and it should be the focus of the Court's inquiry. Moreover, under the Court's analysis in *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 378 (1983), it is clear that the CFC is a limited public forum, and therefore petitioner's exclusionary criteria must be measured under the strict standard of scrutiny required by the First Amendment.

In any event, judged by any standard, the petitioner's decision to exclude virtually all charitable organizations engaging in substantial advocacy is far from reasonable. On the contrary, the distinction urged by the petitioner between "traditional charities" and charities that engage in

advocacy distorts the essential nature and history of charitable activity, imposes a content-based restriction, and punishes charities for engaging in constitutionally protected activities, such as litigation and public education. Accordingly, the exclusion cannot stand.

I. THE CFC IS A LIMITED PUBLIC FORUM.

The starting point for any analysis of the nature of the forum at issue here must be *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983). There, this Court refined the analysis it had employed in the past for assessing whether a forum was "public" in nature. After canvassing its prior decisions, the Court concluded that there are three categories of forums – traditional public forums, limited public forums, and non-public forums. The Court stated that "[a]t one end of the spectrum are streets and parks," which are "quintessential public forums." 460 U.S. at 45. For these traditional public forums, access restrictions may be sustained only if they meet the most exacting demands of the First Amendment.

The Court further observed that "[a] second category consists of public property which the State has opened for use by the public as a place for expressive activity." For these "limited public forums," the Court emphasized that the "Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Id.* at 45 (citations omitted). The Court went on to note that while the State was not bound to retain the open character of the limited public forum, "as long as it does so it is bound by the same standards as apply in the traditional public forum." *Id.* at 46.

Finally, the Court identified a third category – "[p]ublic

property which is not by tradition or designation a forum for public communication." *Id.* For non-public forums, restrictions can be imposed provided that they are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

Perry is instructive for two reasons. First, it refutes the petitioner's suggestion that the relevant focus should be on the federal workplace, as opposed to the CFC itself. Second, it demonstrates that the CFC is a limited public forum, not a non-public forum, as the petitioner contends.

1. In arguing that the CFC is a non-public forum, the petitioner relies heavily on his assertion that the federal workplace, and not the CFC, is the relevant forum. According to the petitioner, the CFC "is an activity that takes place in the federal workplace. It is the workplace, and not the Campaign, to which respondents ultimately seek access." Pet. Br. at 23 n. 18 (citations omitted). The petitioner's argument is flawed in many respects, and wholly ignores the analysis employed by the Court in *Perry*.

To begin with, there is no merit to the petitioner's suggestion that respondents, *amici,* or other charitable organizations are seeking access to the federal workplace. Had the federal government not established and sponsored the CFC for the past two decades, this case would not have arisen. To *amici*'s knowledge, charitable organizations have never claimed that there is an unbridled, constitutionally protected right to be admitted to the federal workplace to inform federal workers of their activities or to solicit contributions. Indeed, it was to provide charitable organizations with a stable, formalized means of access to the federal workplace that the government – in an effort to stimulate charitable contributions by

federal workers — created the CFC. Through the establishment of the CFC, the government forged a regular channel by which charities could inform federal workers about their activities, and federal workers, once so informed, could decide which organizations they wished to support. Thus, it is the CFC — and not the federal workplace itself — to which respondents, *amici* and other charities seek access.

Nor has the petitioner even attempted to offer an explanation as to why the CFC is not a forum in its own right. The CFC is more than merely an "activity." On the contrary, it has all the attributes of a forum. Thus, the CFC provides a stable mechanism for the regular exchange of information, as does a magazine, a newspaper, or an established university forum, and it has served this function for decades. Through the CFC, federal employees are provided specific information about the activities of participating charities and support the organizations they choose through contributions. In this respect, the CFC is no different from the university meeting facilities at issue in *Widmar v. Vincent,* 454 U.S. 263 (1981), the school board meetings at issue in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976), or the municipal theater at issue in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), all found to be limited public forums.

Perhaps most importantly, the petitioner entirely overlooks the Court's analysis in *Perry*. There the Court examined whether the School District's mail system constituted a public or non-public forum. Just as in this case, the Court was confronted with two alternative views of the appropriate forum — the mail system itself, or the broader forum of the school, the school building, or the entire School District. Without addressing the question, the

Court focused its inquiry solely on the mail system, taking the view that the mail system itself, which is analogous to CFC, constituted the relevant fourm. No member of the Court suggested that the majority had looked at the wrong forum. There is no reason for departing from the approach taken in *Perry* here.

2. When appropriately analyzed under *Perry,* it is clear that the CFC is a limited public forum.[4] As the Court described in *Perry,* a limited public forum "consists of public property which the State has opened for use by the public as a place for expressive activity." 460 U.S. at 46. This definition could hardly fit the CFC more precisely. The government founded the CFC for a single purpose: to establish a stable channel of communication between charities and federal workers. Not only was the CFC "opened up for use by the public for expressive activity," but it was created solely for that purpose and has served that purpose for the past two decades. Indeed, the CFC's only function is to provide a means by which charities can engage in the expressive activity of informing federal employees of their activities, and federal employees can engage in the expressive and associational activity of providing financial support for charities they deem worthwhile.

A comparison of the Court's prior cases involving limited public forums and non-public forums strengthens *amici*'s position that the CFC is a limited public forum. The principle that ties the non-public forum cases together is that in each case the forum was "not by tradition or

[4]Although the court of appeals found it unnecesary to resolve the question of the nature of the CFC as a forum, the district courts that have considered the question have concluded that the CFC is a limited public forum. *See* Pet. App. at 19a; *see also NAACP Legal Defense and Education Fund v. Campbell,* 504 F. Supp. 1365, 1367 (D.D.C. 1981).

designation a forum for public communication." *Perry*, 460 U.S. at 46. Applying that standard, the Court noted that prisons, military bases, municipal transportation systems, and postal mailboxes were non-public forums. *Id.* at 46, *citing Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), and *Adderley v. Florida*, 385 U.S. 39 (1974) (prisons); *Greer v. Spock*, 428 U.S. 828 (1976) (military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (municipal transportation systems); and *United States v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (postal mailboxes). In sharp contrast, by both tradition and designation, the CFC has served as a forum for public communication. Indeed, it has served no other function.[5]

[5]Although the Court in *Perry* ultimately ruled that the school's mail system was a non-public forum, the decision in *Perry* supports, not undercuts, *amici's* argument. In *Perry*, a rival union challenged a collective bargaining agreement between the school district and the teachers' exclusive bargaining representative which gave the bargaining representative, but no other labor organization, access to the school district's internal mail facilities. The Court found that, in providing access solely to the certified union, the school district had not granted "access as a matter of course" to all who sought to distribute material, and thus had not created a public forum. On the other hand, the Court went out of its way to limit the reach of its holding. Recognizing that the school mail facilities had been used on occasion by certain groups of interest to students, such as the Cub Scouts and the YMCA, the Court expressly observed that the mail system might be a "limited public forum" for "other entities of similar character." 460 U.S. at 48. The CFC stands on precisely the same footing. It has been used for years by charities similarly situated to respondents and *amici*, and hence it is a limited public form at least insofar as health and welfare charities are concerned.

In this crucial respect, the CFC is far closer to the cases cited by the Court in *Perry* as exemplifying the limited public forum. Thus, this case bears substantial resemblance to *Widmar v. Vincent*, where the "forum" was a state university's meeting facilities. There, the Court observed that although the university was under no compulsion to do so, it had historically permitted student groups to use the meeting facilities, thereby creating a limited public forum. Accordingly, the Court held that as long as the university maintained its policy, the university could not exclude groups absent a compelling state interest. 454 U.S. at 269-70. *See also Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*, *supra*, 429 U.S. at 175 (state not required to conduct business in open session, but where it has opened up a forum for public involvement, exclusions bear a heavy burden of justification); *Southeastern Promotions Ltd. v. Conrad*, *supra*, 420 U.S. at 555-559 (because municipal theater was a public forum, city could not exclude a particular production without satisfying strict standards applicable to prior restraints).

Here, just as in *Widmar*, *Madison Joint School District*, and *Southeastern Promotions*, the government had no obligation to create the CFC. However, once it found a need for such a forum, created it, and regularly granted many health and welfare charities access to it, the government surrendered its right to deny similar charities access to the CFC. As the Court stressed in *Perry*, as long as the government maintains the CFC, "it is bound by the same standards that apply in the traditional public forum." 460 U.S. at 46. Thus, in order to uphold the exclusion of advocacy groups, the petitioner bears a heavy burden of justification — a burden he has not even attempted to

shoulder in this case. Accordingly, the exclusion cannot stand.[6]

II. REGARDLESS OF THE STANDARD APPLIED, THE EXCLUSION OF ADVOCACY GROUPS FROM THE CFC CANNOT BE SUSTAINED.

Under *Perry*, "the touchstone for evaluating . . . distinctions [in access to non-public forums] is whether they are reasonable in light of the purpose which the forum at issue serves." 460 U.S. at 49. Even judged by this "reasonableness" standard, the petitioner's exclusion of advocacy groups from the CFC cannot pass muster.

To demonstrate that his decision is reasonable, the petitioner argues that there is a recognized distinction between "traditional charities, particularly those that provide basic health and welfare services to the needy," and "other types of organizations," such as those that engage in advocacy. Pet. Br. at 31. With this premise as the cornerstone of his argument, the petitioner then points to three justifications

[6]The petitioner has argued that the eligibility requirements the CFC has operated under in the past have so limited access that the CFC was never "public" in nature. However, that argument flies in the face of the factual findings of the courts below, which found that the respondents and similar charities such as *amici* are virtually identical in status to the charitable organizations that have participated in the CFC in the past. Indeed, the court of appeals expressly noted that "both in terms of their longstanding treatment under the tax code and the parameters for the CFC as it has traditionally been understood, the status of [respondents] and included charities is virtually identical." Pet. App. 22a. Thus, the court of appeals concluded that, under the prior standards, respondents, as well as other charitable organizations which promote health and welfare, would have been eligible to participate in the CFC. *Id.* For that reason, it is clear that the CFC qualifies as a limited public forum for health and welfare charities.

for excluding "non-traditional" charities: (a) that the inclusion of controversial groups, especially those that engage in litigation, would threaten the success of the CFC; (b) that permitting advocacy groups to solicit through the CFC suggests that the government somehow endorses the position of the charity, which might lead to the perception of the politicization of the CFC; and (c) that there are alternative channels for excluded charities to communicate with federal workers.

We demonstrate below that each of the specific justifications proffered by the petitioner is not only unreasonable, but offends the First Amendment and should be rejected. However, it is important to understand first that the purported distinction between "traditional" and non-traditional charities is baseless, and has already been soundly rejected by this Court.

Although the petitioner claims that there is an historical distinction between traditional and non-traditional charities, he never identifies the source of the purported distinction or instances in which it has been applied. Thus, for example, the petitioner's argument cannot be squared with the Internal Revenue Service's regulation of charitable organizations, which has never drawn the distinction urged by the petitioner. The only limitation in the Internal Revenue Code even arguably relevant here is the restriction in section 501(c)(3) which limits the degree to which charities entitled to receive tax-deductible contributions may engage in lobbying. *See Regan v. Taxation with Representation,* 461 U.S. 540 (1983). No similar limitation is imposed on litigation or public education activities. However, petitioner has even disregarded the congressional judgment embodied in section 501(c)(3), which is to *support* lobbying activities up to the specified limit. The

effect of petitioner's exclusionary criteria is to disqualify many section 501(c)(3) charities which engage in lobbying activities expressly permitted by Congress.

Nor is petitioner's argument consistent with the decisions of this Court. In both *State of Maryland v. Munson,* 104 S. Ct. 2839 (1984), and *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), this Court rejected attempts to subject advocacy organizations to onerous registration requirements not applicable to other charities. Although both of the government entities involved in *Schaumburg* and *Munson* urged the Court to sustain the requirements based, in part, on the distinction urged by the petitioner here, the Court declined to do so.

Moreover, the distinction urged by the petitioner does not hold up when carefully analyzed. In discussing "traditional" charities, the petitioner presumably means those charitable organizations that seek to promote basic health and welfare by providing food to the needy, or conducting research in an effort to find a cure for cancer. Nowhere, however, does the petitioner grapple with the fact, as determined by the courts below, that many advocacy charitable organizations, including respondents, seek similar worthwhile goals. They simply do so by different means, such as conducting litigation over the denial of disability benefits under social security, or by engaging in public education campaigns directed toward increasing federal cancer research. Thus, the distinction relied on by the petitioner for excluding "non-traditional" advocacy groups is without force.

Nor is the distinction as clear as petitioner suggests. The Executive Order nowhere mentions the terms "traditional" or "advocacy" charities, and the distinction is not one

rooted in history. Many "traditional" charities have long engaged in advocacy and public education campaigns, seeking among other things to secure additional funds for federal health and social welfare programs or to inform the public about particular health hazards. Even the petitioner has encountered difficulty drawing lines. Thus, for example, the United States Olympic Committee, which provides no assistance whatsoever to the hungry or the sick, is considered by petitioner to be a "traditional" health and welfare charity, as are legal aid societies, even though they do little but engage in advocacy. These illustrations underscore the vague and indeterminate nature of the distinction petitioner rests his case on, and give rise to *amici*'s fear that petitioner seeks to "pick and choose" among similarly situated charities, and support those with whom he agrees by affording them access to CFC. *Amici* submit that, under any standard, the First Amendment forbids this sort of unbridled administrative discretion. *See, e.g., Perry,* 460 U.S. at 55.

Equally troubling is the fact that the specific justifications offered by the petitioner for excluding advocacy organizations strike at the core of the First Amendment. We examine petitioner's justifications in turn.

1. The principal argument advanced for excluding advocacy organizations is that they are by definition controversial and thus their participation in the CFC endangers the viability of the program. According to the petitioner, some federal workers may decide not to participate in the CFC if there is some possibility that their contributions might support a group with which they disagree.

Amici rely on respondents to demonstrate that the factual predicate for this argument — that inclusion of ad-

vocacy groups might lead to a reduction in employee participation — is without foundation. More fundamentally, however, this Court has long condemned the notion that "controversiality" could qualify as a valid justification for restricting speech. *Police Department v. Mosley,* 408 U.S. 92, 96 (1972); *Tinker v. Des Moines School District,* 393 U.S. 503, 508 (1969); *Terminiello v. Chicago,* 337 U.S. 1 (1949). Indeed, it is settled constitutional doctrine that the government many not rely on a "heckler's veto" to muzzle a controversial speaker, particularly where, as here, there is little beyond speculation to establish that harm might result if the speech is permitted to go forward. *Id.*

Moreover, the exclusion of "controversial" groups to "protect" the CFC smacks of the sort of paternalism this Court has found impermissible in the past. As the Court noted in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976), "[t]here is, of course, an alternative to [a] highly paternalistic approach," which is to "assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them." *See also Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). There is no plausible reason to believe that members of the federal workforce are incapable of determining which of the charities participating in the CFC they wish to support. On the contrary, federal employees have a strong interest in the widest range of options, so that they may exercise their expressive and associational rights without restraint. *Amici* urge the Court to reject petitioner's paternalistic approach.[7]

[7]As is explained fully in respondents' brief, any federal employee can completely avoid the possibility of inadvertently supporting an organization with which he disagrees simply by designating his contribution for a group he supports. The availability of this option disposes of petitioner's claim. *Consolidated Edison Co. of New York v. Public Service Comm'n,* 447 U.S. 530, 542 (1980).

2. The petitioner's second justification — that permitting advocacy organizations to participate in the CFC raises the specter of government endorsement of the various advocates — fares no better. While *amici* again leave the factual refutation of this argument to respondents, *amici* submit that *Widmar v. Vincent* disposes of this argument as a constitutional matter.

In *Widmar,* this Court upheld a challenge by a student religious group to the university's refusal to allow the group to use campus meeting facilities, despite the fact that the university permitted other student groups to meet on campus. The university defended the exclusion on the ground that the Establishment Clause of the Constitution required it to deny the students access because granting permission might appear to be an endorsement of the group's activities. In ruling against the university's claim, the Court soundly rejected the argument that the exclusion of a class of speakers from a forum can be justified solely on the ground of avoiding apparent endorsement, particularly where, as here, there is no basis for anyone to confuse the role of the government with that of the speaker. 454 U.S. at 274 & n.14. Thus, the Court has already rejected precisely the argument on which the government relies. *See also Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980) (rejecting endorsement theory).

Of equal importance, the Court also recognized in *Widmar* that what the university was seeking to enforce was, at its core, a content-based restriction, which was imper-

missible, absent a compelling state interest. Here, the exclusion of advocacy organizations is nothing other than a content-based restriction of the kind condemned in *Widmar*. By distinguishing among organizations solely on the basis of the type of associational and expressive activities in which they engage, the government is promoting the speech of what it considers to be more traditional charities, while punishing through the denial of access to the CFC those charities that engage in advocacy. The First Amendment's hostility to content-based regulation of speech is indisputable. As the Court reiterated in *Widmar*, "[o]ur cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content," 454 U.S. at 276 (citations omitted), and the petitioner has proffered no compelling justification here.

The petitioner's determination that involvement in litigation and public advocacy justifies disqualification from the CFC only heightens the offensiveness of the exclusion. It is firmly established that the right to engage in litigation is protected by the First Amendment, both as a means of petitioning the government for redress of grievances, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and as an important component of the right of association. *NAACP v. Button*, 371 U.S. 415, 430 (1963). Accordingly, this Court has consistently relied on the First Amendment in striking down attempts to interfere with the right to seek redress in the courts. *See, e.g., United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222-23 (1967); *cf. In re Primus*, 436 U.S. 412 (1978). Similarly, this Court has repeatedly emphasized that the right to engage in lobbying and public education to promote political or social

goals is deserving of the full range of First Amendment protections. *See, e.g., Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940). Petitioner's exclusionary criteria are directly aimed at these protected activities.

Nor does petitioner's contention that the exclusion is "viewpoint-neutral" alter the fact that the exclusion is a content-based prohibition requiring close scrutiny. This Court rejected precisely the same contention in *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980), noting that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Accord, Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Department v. Mosley, supra*. Thus, it is of no significance that the petitioner's exclusion applies with equal force to all advocacy groups, regardless of political orientation.

3. As its final argument, the petitioner suggests that the exclusion is proper because alternative forums exist which afford the excluded charities an opportunity to seek the support of federal workers. Thus, the petitioner contends that the excluded charities could solicit contributions from federal workers outside the workplace or engage in direct mail or door-to-door campaigns directed at federal employees, even though he concedes that these methods of fund-raising would not be as effective as participating in the CFC.[8]

[8]To *amici*'s knowledge, comprehensive listings of federal employees are not available, and therefore it would not be possible to engage in direct mail or door-to-door solicitation. Thus, the proposed alter-

The principal flaw with this argument was correctly identified by the court of appeals: in the absence of some reasonable basis for excluding advocacy groups which is directly tied to the purpose of the CFC, the mere existence of alternative channels of communication, even if they are equivalent in all respects, cannot justify an otherwise unreasonable discrimination among charities. The fact that at times this Court has suggested that the existence of alternative channels may be a factor in determining the reasonableness of an exclusion does not help the petitioner. In each of those cases, there were reasonable justifications proffered for the exclusion which had no relation to the content of the expression. And in each of these cases, the exclusions at issue were content-neutral time, place and manner restrictions, which did not implicate any of the sensitive First Amendment concerns raised by the justifications petitioner has offered.

Instead of supporting petitioner, this line of cases substantially undercuts his position. While this Court has upheld time, place and manner restrictions, it has also made plain that the existence of alternative channels of communication does not in itself justify excluding similarly situated speakers. *E.g., Clark v. Community for Creative Non-Violence,* 104 S. Ct. 3065, 3069 (1984); *United States v. Grace,* 461 U.S. 171 (1984); *Schneider v. State,* 308 U.S. 147 (1939). Rather, the Court has consistently held that such an exclusion must be grounded in a compelling state interest, which is plainly absent here.

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natives are markedly inferior to the CFC, and, under such circumstances, the Court has rejected "alternative channels" arguments. *See, e.g., Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 556.

CONCLUSION

For the reasons stated above, and those given in respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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